



**Vicos Holdings Limited v Ngeno & 4 others; Shelly Holdings Limited (Interested Party)
(Environment & Land Petition E04 of 2023) [2025] KEELC 3348 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION E04 OF 2023**

AE DENA, J

APRIL 24, 2025

BETWEEN

VICOS HOLDINGS LIMITED PETITIONER

AND

RACHEL CHEPNGETICH NGENO 1ST RESPONDENT

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

DIRECTORATE CRIMINAL INVESTIGATION 3RD RESPONDENT

SIMON MUNYI THEURI 4TH RESPONDENT

DENNIS GATHU WAITHAKA 5TH RESPONDENT

AND

SHELLY HOLDINGS LIMITED INTERESTED PARTY

RULING

BACKGROUND & FACTS OF THE PETITION

1. To put things into perspective I find it necessary to give a background of this petition.
2. The Petitioner claims to be the registered proprietor of the title LR No. 13449 Kwale Diani Beach Block (suit property). That in the year 1988 Shelly Holdings Ltd the Interested Party and which is the Petitioner's sister company bought the suit property from Jonathan Kimelet Ng'eno (deceased) for a consideration of Kshs. 7,500,000/= which was later reviewed to Kshs. 6,000,000/=. That the deceased signed the transfer before his advocate on 18/11/1988. The Petitioner vide a resolution of the Board directed the vendor to transfer and register the suit property in the name of the Petitioner Vicos Holdings Ltd.



3. According to the Petitioner, the 1st Respondent who is the surviving spouse of the deceased, through a letter to the 3rd Respondent denied having sold the suit property to the Petitioner. That investigations were ongoing in this regard. That the Petitioner's investigators Mwara Investment Ltd tried to conduct search at the Mombasa Land Registry but the registrar declined to provide the search record, as the file was under lock and key. That upon further inquiry at the said registry it occurred there were two related grants CR 72707 for LR. No. 13449/1 and CR 72708 for LR. No. 13449/2 registered in the names of the 4th and 5th Respondents. That efforts to trace further information on these two grants from the Survey of Kenya and Ardhi House Nairobi did not yield much as there were no records on the same.
4. According to the Petitioner, the land was allotted to the deceased and has never been subdivided. At paragraph 17 to 25 the Petitioner gives a history of how they acquired the property, the documentation executed and obtained for purposes of the transaction culminating to the registration in the name of the Petitioner on 19th January 1989.
5. It is averred that sometime in 2004 it came to the attention of the Petitioner that there were fake titles in respect of the suit property. The Petitioner lodged a complaint and recorded a statement to the Provincial Commissioner Coast Province. That this resulted into Nairobi RMCC No. 260 of 2004 and upon furnishing the original title to the suit property the court confirmed it as the genuine title. That since the registration of the Petitioner they have been up to date with obligations under the lease as to rent and rates and that they have never entered into any transactions including sale, transfer, subdivision.
6. The Petitioner avers that the 1st Respondent has through her servants' agents and proxies invaded and occupied the suit property claiming to be the rightful owners. That these actions seek to arbitrarily deprive the Petitioner of its property contrary to Article 40 of *the Constitution*. It is also averred that the investigations by the 3rd Respondent were contrary to the Fair Administrative Actions Act as the same are unlawful, unreasonable and procedurally unfair.
7. The Petitioner Prays for the following verbatim orders; -
 - a. A declaration be and is hereby made that the 3rd Respondent's ongoing investigations over the title of the suit property LR No 13449 violates of articles 10, 27[1][2][4], 40[1][3], 47 of *the constitution* of Kenya and therefore is unconstitutional.
 - b. A declaration be issued that the grants CR 72707[LR 13449/1] and CR 72708[LR 13449/2] and all consequential records in the name of the 4th and 5th Respondents fraudulently obtained and therefore illegal null and void.
 - c. A judicial review order of certiorari be and is hereby issued quashing the 2nd Respondent's issuance of CR 72707[LR 13449/1] and CR 72708[LR 13449/2] and all consequential records in the name of the 4th and 5th Respondents
 - d. An order of certiorari removing into this court and quashing the criminal investigations being conducted by the 3rd Respondent, its agents, employees and/ or servants contained in a letter dated 4th September 2023 directed at the Petitioner to furnish documentation/confirmation of proof of ownership over LR No 13449
 - e. A permanent injunction against the Respondents their agents, servants, proxies or employees or whomsoever from entering, occupying or interfering with quiet and peaceful possession of the property LR No 13499 Kwale/Diani Beach Block by the Petitioner



- f. This honourable court be pleased and do hereby grant a judicial review order of prohibition restraining the 1st Respondent from asserting proprietary rights over the suit property.
- g. A declaration that the Petitioner is the rightful owner and proprietor of the suit property being LR No 13449/ Kwale Diani Beach Block
- h. An order of eviction of the persons who have currently trespassed into the suit property at the behest of the 1st Respondent with the help of the officer commanding station in Kwale and Diani.
 - i. Compensation in general damages for loss and injury arising from the loss of use of the suit property to be assessed by court.
- j. Any other suitable relief that this court deems fit and just to grant.
- k. The costs of the petition be borne by the Respondent.

1st Respondents Application

8. The Petition was scheduled for judgement on 22nd October 2024 after parties filed submissions. However, on 3/10/2024 the 1st Respondent Rachel Chepngetich Ngeno filed an application dated 1st October 2024. I issued directions for service and responses and scheduled the hearing of the application interpartes on the said date of judgement.
9. The application seeks the following orders;
 - a. Spent
 - b. Pending the interpartes hearing and determination of the application, this Honourable court be pleased to arrest its own judgement scheduled for delivery on 22/10/2024
 - c. This Honourable court be pleased to direct that the hearing of this suit proceeds by way of viva voce evidence
 - d. This Honourable court be pleased to allow the Petitioner and Respondents to file witness statements and introduce witnesses in Court and give evidence in examination in chief and be cross examined
 - e. Costs of the application be in the cause.
10. The application was based on the grounds on its face and the supporting affidavit of the 1st Respondent sworn on 1/10/2024. It is deponed that there is very strong evidence of fraud on the part of the Petitioner indicative in the conflicting dates in the letters of consent, failure to provide spousal consent, failure by the Petitioner to conduct a search at the time of his alleged purchase of the property, continued payment of land rent by the applicant to the Commissioner of Lands and investigation report by the DCI together with its affidavit evidence. That there are glaring inconsistencies in the Petitioners' documents and chronology of events which raise questions on the purported transfer. That these can only be properly interrogated through oral evidence and cross examination of the Petitioner and other witnesses.
11. The applicant depones that there is new and material evidence from the DCI through a detailed affidavit which was critical to determining the true ownership. The affidavit is stated to be annexed as RCN2. That the findings of the DCI must be cross referenced with the Petitioner's evidence. The DCI should also present their evidence and be tested in cross examination. That the factual evidence on



ownership of the suit property cannot be adequately resolved through affidavit evidence alone. That a full oral hearing is necessary for the court to arrive at a just and fair judgement.

12. The applicant states the principles of natural justice and constitutional right to a fair hearing under article 50 of *the Constitution* of Kenya would be compromised were the court to proceed to judgement without allowing the material facts including the DCI findings to be ascertained through cross examination and further hearing. That the issues surrounding the dispute are complex involving fraud and irregularities.
13. The applicant depones she is bound to suffer irreparable harm as she stands to lose the property which has been in the family since 1982. The court is urged to allow the application as no prejudice will be occasioned to the Petitioner.

Responses to the Application

14. The application is opposed.

Petitioners Response

15. The Petitioner filed a replying affidavit sworn on 9/10/2024. It is averred that the application to arrest judgement after all parties have filed submissions is termed an abuse of court process. It is an attempt to delay the disposition of the matter while the 1st Respondent and her agents are illegally sitting and enjoying possession of the Petitioners property. That the applicant has not attached any documents or evidence in support of their assertions of right of ownership of the suit property. That directions on the mode of disposal of the petition were issued in the presence of all the parties who were agreeable. That all parties complied including the 1st Respondent whose submissions are dated 13/8/2024. That the applicants intend to rely on a replying affidavit filed by the 3rd Respondent after the close of pleadings without leave which ought to be struck out. That the applicant has the option of replying to the 3rd Respondent's affidavit rather than calling for hearing viva voce which will further delay the matter. That the essence of the Mutunga Rules is to ensure just, expeditious disposal of petitions and including rule 6 thereof.
16. It is further contended that the applicant has always participated in the proceedings but chose not to file anything to proof their case. That rule 20 of the Mutunga Rules gives powers to the court to direct on how a Petition should be heard. That the matter has now been fully heard, issues framed and the proposal for viva voce evidence has been rendered moot and or overtaken by events. That the application is not based on any legal provision in law or the rules. That the Petitioner had legitimate expectation and the outcome of the judgement. That having acquiesced to the facts the applicant should not be allowed to reverse the wheels of justice. Further that the applicants have not put forward their case either by cross petition or by titles showing proof of ownership whereas the Petitioner has clearly proved the ownership of the property and how it was acquired.
17. The court is invited to dismiss the application for want of merit and proceed to deliver the judgement.
18. The Attorney General did not participate in the present application.

Submissions

19. The application was canvassed by way of written submissions. The applicants' submissions are dated 31/10/2024 and the Petitioners are dated 15/10/2024. The court has considered the submissions.



Analysis and Determination

20. The court has considered the application, the responses thereto and submissions on record and the main issue is whether this suit commenced by way petition should be heard by way of viva voce evidence.
21. It is not in dispute that indeed the court had issued directions on the disposal of the petition herein and had reserved a date for judgement. The present application was filed before the date of the judgement.
22. The application is brought under the provisions of Order 40 Rules 1,2 and 3 of the Civil Procedure Rules 2010 and Sections 1A,1B,3A of the *Civil Procedure Act*. It is trite that Order 40 is the law on grant of injunctions and interlocutory orders. I have also not seen any prayer for preservation of the suit property as envisaged under these provisions. The provisions have nothing to do with arresting of a judgement. This I note could be the basis for the Respondent's contention that the application to arrest a judgement has no basis in law.
23. The application has however also been brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* which are largely on the objectives of the Act and inherent powers of the court. Basically, these provisions reinforce the oxygen principles and emphasize interlia the need for just resolution of civil disputes. Article 159(2)(d) of *the Constitution* of Kenya 2010, mandates that justice shall be administered without undue regard to procedural technicalities. I will therefore proceed to consider the substance of the application.
24. The Petitioner contends that the application is an abuse of the court process and the court has noted the Petitioner's rendition of the events culminating to the filing of the Respondent's pleadings including the instant application. It is submitted by the Petitioner that the applicant knowing very well she has no rights or interest over the suit property has resorted to use disingenuous means by filing frivolous applications.
25. It is further contended that the application runs afoul the provisions of Rule 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 which were to ensure just and expeditious disposal of petitions. Also rule 6 thereof which enjoins parties to comply with the orders of the court.
26. For me the gist of this application is whether this petition ought to be disposed of by way of viva voce evidence and not written submissions. The suit having been commenced by way of petition is governed by *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013) otherwise known as the Mutunga Rules.
27. Rule 20 provides for the hearing of petitions as follows; -
 20. (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—
 - (a) affidavits;
 - (b) written submissions; or
 - (c) oral evidence.
 - (2) The Court may limit the time for oral submissions by the parties.
 - (3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.



- (4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.
- (5) A person summoned as a witness by the court may be cross examined by the parties to the petition.
28. The applicants referred the court to the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Atega & 3 others* [2020] eKLR which I note was commenced by way of petition and was determined by way of written submissions upon the Respondents filing their responses to the petition. The matter went on appeal to the Court of Appeal where one of the grounds of appeal was that the learned judge erred by issuing a permanent injunction against the three appellants thereby stopping their operations without calling for viva voce evidence.
29. Makhandia J (judge of Appeal) on the above considered whether viva voce evidence is a mandatory requirement in petitions for enforcement of fundamental rights and freedoms. Secondly whether the learned judge erred in giving directions on proceeding with the hearing based on affidavit evidence and written submissions and thirdly whether the three appellants right to a fair hearing was violated because viva voce evidence was not taken by the trial court. I find these issues resonating with the present application. The learned judge also referred to Rule 20 which I have already cited.
30. The learned judge was persuaded by the merits of the principles enunciated in the undernoted comparative jurisprudence, approved and adopted them; -

“I am cognizant that in the persuasive case of in *Re Estate of Joseph Mapesa Nakuku (Deceased)* [2019] eKLR it was stated that it would have been wiser for the parties to give viva voce evidence since the same has a way of bringing out the facts more clearly, particularly in a contested matter.”

Comparatively, in the South African case of *S - v- J. Sibanda* (Judgment No. CCZ 4/17, Const. Application No. CCZ 14/15) [2017] ZWCC 4 (17 March 2017), it was expressed that “there are cases where the leading of evidence would not be necessary, particularly where the facts giving rise to the request are common cause. In such a case, it would serve no meaningful purpose for the parties to be required to give viva voce evidence. Where, however, the facts are not common cause, the parties must, as a general rule, be required to give evidence.”

In the Lesotho case of *Zwelakhe Mda v Minister of Home Affairs and Others* (Constitutional Case No.4 of 2014) [2014] LSHC 30 (24 September 2014); it was expressed that where there is no real, substantial and material dispute of fact which makes it impossible to dispose of a matter without resort to viva voce evidence, the factual differences can be decided on the papers by affidavit evidence.

31. It is important to note that the above principles do not invite the court to delve into the merits of the case. In this regard I must observe that the Petitioner has in its submissions spent a lot of time in reviewing the evidence in support of his title and coming up with a conclusion that the 1st Respondent has no interest in the suit property for failure to annex any proof in terms of documentation. I will respectfully state that the issue as to who is the lawful owner of the property is the preserve of the court at the point of delivering the judgement herein. Clearly it would be wrong to go into the merits of the case at this point and the Petitioners’ arguments cannot form a consideration in rendering this ruling.



32. Guided by the principles set in the case law above I will proceed to determine if there are substantial material disputes or contested matters that require parties to be heard viva voce.
33. The reasons advanced for seeking to have the matter heard viva voce as I understand them is that there highly contested matters of facts and chronology of events surrounding the acquisition of the suit property by the Petitioner. The contested matters have been explained and which were responded to by the Petitioners and I will again emphasize that this is not the forum to get into the merits of the case. It is submitted that the court can only ascertain them through viva voce evidence and not cold affidavit evidence as was the holding by Odunga J in Republic v Nairobi City County & another Ex-Parte Premier Food Industries Limited [2016] KEHC 4145 (KLR).
34. I agree the issue of who is the proper owner of the suit property is highly contested. It is trite that fraud must be proved at a slightly higher standard than that of probability of success. The matter is further complicated by the alleged existence of the 4th and 5th Respondents who are also said to be registered in the two related grants CR 72707 for LR. No. 13449/1 and CR 72708 for LR. No. 13449/2. In my view it is important that the 2nd Respondent who filed a replying affidavit sworn by G.O. Nyangweso should shed light on the depositions, be cross examined and assist the court in arriving at fair decision in this matter. Additionally, there is the issue of the investigations by the 3rd Respondent which has been called into question and needs to be tested as well. I must point out the alleged affidavit is not attached to the supporting affidavit but that notwithstanding the DC1 may be summoned at any time to shed light on the issues. It would be in my view very drastic of this court to strike out a pleading on the basis of being filed out of time.
35. All the above gives the parties a level playing ground to test the evidence of the witnesses including the court which is at liberty to cross examine and even call any witnesses on the emerging controversies.
36. The foregoing would in my view meet the criteria given in the case law cited in favor of a hearing viva voce. I'm further emboldened by the case of Attorney General & Another Vs Uasin Gishu Memorial Hospital Limited & Another (2021) eKLR, where the Supreme Court made the following observations; -
- “...it not contested in the superior courts and even before this Court that the question of ownership of the suit premises, the legal status of the 1st Respondent and compensation (if any) upon acquisition of the suit premises by the Appellants and vesting the same upon the 2nd Respondent are highly contested. We do agree with the High Court on its finding only to the extent that the matter could not be determined by affidavit evidence in the manner in which the suit was presented before it.”
37. Moreover, arising from Rule 20 above a petition can not only be heard by submissions but also by way of oral evidence. Any of the parties may apply for the petition to be heard by way oral evidence otherwise known as viva voce evidence. There is nothing stopping a party therefore from moving the court as such. I see the spirit of Rule 20(3) and (4) which when read together is on evidence that is likely to assist the court to arrive at a decision and it does not need to be new evidence in my view. Rule 20 does not stifle the discretion to order a matter be heard viva voce provided that an application is made. In fact, the discretion to recall a witness seems to envisage instances where a court may recall a witness at a later stage. It is justice which then becomes of the essence and not the stage at which the application is made.



38. The court is further persuaded by the case of Rosemary Wanjiru Njiraini –Vs- Officer in Charge of Station, Molo Police Station & another [2017] eKLR where Justice Sila Munyao took the following path; -

‘5. Directions had earlier been taken for the petition to be disposed of by way of the affidavit evidence and written submissions, which was done. I then retired to write a judgment. However, upon going through the material that had been presented by the parties, I formed the view that there were serious questions of fact to be determined, including the question whether the land had been set aside for public utility or whether it was one set aside as a police station. I came to the conclusion that I am unable to determine all issues based solely on the affidavit evidence before me, and on reflection, I directed that the case be heard by way of oral evidence.’

39. Sections 1A, 1B, and 3A of the *Civil Procedure Act* which are also echoed in the Environment & *Land Act* and Articles 2(1), 50(1), 159, & 259(1) of *the Constitution* call upon courts of law to do justice to all and sundry that come before them. Whether one has good case or not that is upon the verdict of the court after evidence has been put on the scales of justice. It is also the duty of a court of law to guide and lead parties and even counsel towards a fair and just resolution of a cause. I’m persuaded that directions on the filing of submissions are not cast on stone. The court must remain cognizant of its eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice.

40. The upshot of the foregoing is that I’m persuaded that this is a matter for hearing viva voce. The following orders shall issue;-

1. The application dated 1st October 2024 is hereby allowed to the extent that the hearing of this suit shall proceed by way of viva voce evidence
2. The Petitioner shall be entitled to the costs of the application to be borne by the Applicant.
3. The matter shall be fixed for Mention before the ELC Judge in Kwale on 3/6/2025 for further directions.
4. Leave to appeal this ruling is granted if required.

It is so ordered.

RULING DATED SIGNED AND DELIVERED THIS 24TH DAY OF APRIL 2025.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Ms. Achieng for the Petitioner

Mr. Ibrahim for the 1st Respondent /Applicant

Mr. Koech Holding brief for Mr.Penda for 2nd and 3rd Respondents

Mr. Hud Hassan – Court Assistant

